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No. 10-1212

Supreme Court, U.S.
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In The
Supreme Court of the United States

MELISSA J. STINE,

Petitioner,

v.

RICK A. YARNALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

DANIEL LUCID
Counsel of Record
56 Village Parkway
Santa Monica, CA 90405
(310) 849-1498
dan@bestcases.org

DAVID KRIEGER
HAINES & KRIEGER, L.L.C.
1020 Garces Avenue, Suite 100
Las Vegas, NV 89101
(702) 880-5554

CHRISTOPHER P. BURKE
218 S. Maryland Parkway
Las Vegas, NV 89101
(702) 385-7987
atty@cburke.lvcoxmail.com

MICHAEL C. LEHNERS
429 Marsh Avenue
Reno, NV 89509
(775) 786-1695

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent Yarnall, in his Brief in Opposition ("Opp."), has presented a second question for review, namely, whether an appeal should be dismissed for noncompliance with the procedural requirements of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules").

Since enactment of the Bankruptcy Code of 1978, the federal circuits have been clearly divided with respect to preservation of issues on appeal under Federal Rules of Bankruptcy Procedure 8006, 8009 and 8010 ("Rules 8006, 8009 and 8010").

The First, Third, Fifth and Ninth Circuits have held that, in bankruptcy appeals, any claim not included in the statement of issues under Rule 8006 or Rule 8010 is waived. But the Second, Sixth and Eleventh Circuits have ruled that the appellate court may exercise broad discretion to infer issues from the bankruptcy record and Rule 8006 or Rule 8010 statement even though a party has failed to list those issues.

The Brief in Opposition states in part:

> Petitioner argues that her appeal to the Ninth Circuit Court of Appeals should not have been dismissed because the relevant issues and record had been fully set forth in the bankruptcy court . . . [but] Petitioner's issues were not properly before the Court of

QUESTIONS PRESENTED – Continued

> Appeals because she never briefed them before the Bankruptcy Appellate Panel. *See In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987), at 173; *Energrey Enters. v. Oak Creek Energy Sys.*, 119 B.R. 739 (D. E.D. Ca. 1990), at 741. Petitioner's willful noncompliance with appellate procedure offered the Ninth Circuit no reasonable alternative but to dismiss her appeal.

Opp. 3-4.

The cases cited here by Respondent, *In re Pine Mountain* and *Energrey Enterprises*, did not involve the prerequisites for standing of a "person aggrieved," and nowhere considered the question of a party's forfeiting its standing to appeal. Rather, those decisions held that an issue is not preserved for appeal under Bankruptcy Rule 8006 unless the appellant includes the issue in its statement of issues on appeal.

The second question presented is:

Whether an issue is preserved for appeal because it is argued in the bankruptcy court and inferable from the Rule 8006 or Rule 8010 statement, or whether an issue cannot be considered if it is not listed explicitly in the statement of issues.

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INTRODUCTION

Petitioner Stine's case falls at the crossroads of conflicting holdings of the federal circuits. The circuits are split regarding the standing to appeal of a "person aggrieved" and dismissal of appeals for noncompliance with the Federal Rules of Bankruptcy Procedure. Petitioner seeks review of the summary dismissal of her appeal by the Ninth Circuit Court of Appeals.

A. THE SPLIT BETWEEN THE CIRCUITS ON STANDING TO APPEAL IN BANKRUPTCY PROCEEDINGS NEEDS RESOLUTION

The Courts of Appeals are evenly divided on the issue of appellate standing in bankruptcy. The Seventh, Ninth and Tenth Circuits have ruled that a party needs to appear and object in the court below in order to have standing to appeal. In stark contrast, the Second and Fourth Circuits, and the Bankruptcy Appellate Panel ("BAP") of the Eighth Circuit, have held that a party has standing to appeal from an adverse judgment even without participating fully at every stage of the related bankruptcy proceedings. The answer to a fundamental question such as appellate standing should not vary widely between federal courts.

The split between the circuits on appellate standing was summarized in *White v. Univision of Virginia Inc. (In re Urban Broadcasting Corp.)*, 401 F.3d 236 (4th Cir. 2005). In the Urban Broadcasting chapter 7 bankruptcy, Theodore White ("White") owned 55% of

the shares of the debtor corporation, and Univision of Virginia Inc. ("Univision") owned the remaining 45% of the shares. Unopposed by White, the bankruptcy court approved Univision's claim at a noticed hearing. After White appealed the bankruptcy court's order, the district court concluded that White was not a "person aggrieved" and had no standing to appeal because the bankruptcy court order specifically barred him from appealing due to his lack of participation, and further because he filed no objection to Univision's claim and failed to appear and object at the hearing on the claim. *White v. Univision of Va. (In re Urban Broadcasting Corp.)*, 304 B.R. 263, 270-71 (D. E.D. Va. 2004). The Fourth Circuit Court of Appeals characterized the district's court holding as consistent with the decisions of the Seventh, Ninth and Tenth Circuits:

> [T]he district court relied on cases from other circuits and concluded that the Fourth Circuit would likely conclude, "consistent with the Seventh, Ninth, and Tenth Circuits, . . . that attendance and objection at the bankruptcy court hearing are pre-requisites to appellate standing" under the "person aggrieved" test. *Id.* at 272. *See, e.g.*, *Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994); *In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 690 (7th Cir. 1992); *In re Commercial Western Finance Corp.*, 761 F.2d 1329, 1335 (9th Cir. 1985).

Urban Broadcasting Corp., 401 F.3d at 243.

In siding with the Second Circuit and Eighth Circuit BAP, the Fourth Circuit held that standing to appeal in bankruptcy proceedings depends wholly on whether the party is directly affected pecuniarily by an adverse bankruptcy court order:

> *But see, e.g., Int'l Trade Administration v. Rennselaer Polytechnic Inst.*, 936 F.2d 744, 748 (2d Cir. 1991) (holding that a "person aggrieved" has standing to appeal whether or not that person sought intervention); *Maryland Sav. Bank v. Michels (In re Michels)*, 286 B.R. 684, 690 (B.A.P. 8th Cir. 2002) (concluding that a creditor had standing to appeal a confirmation order even though it failed to file a timely proof of claim); *In re E.C. Ernst, Inc.*, 2 B.R. 757, 761 (D. S.D. N.Y. 1980) (recognizing that the now-repealed Bankruptcy Act provision that originated the "person aggrieved" standard did not include any appearance requirement).

Urban Broadcasting Corp., 401 F.3d at 243. The Fourth Circuit concluded that White's standing to appeal was not negated by his noncompliance with the bankruptcy court order or his failure to appear or object at the hearing on Univision's claim. Nonetheless, the circuit court affirmed the district court's dismissal of the appeal on the grounds that an order of the bankruptcy court explicitly barred White from appealing after he failed to object or give evidence; and further, because White was not a "person aggrieved" because he suffered no direct and adverse pecuniary harm as a result of the bankruptcy court's approval of the disputed claim.

The prerequisites for standing to appeal in bankruptcy should be uniform among the federal circuits, and at present such uniformity is lacking.

B. THERE IS A SHARP CONFLICT BETWEEN THE CIRCUITS ON WHETHER AN ISSUE IS PRESERVED FOR APPEAL IF IT IS ARGUED IN THE BANKRUPTCY COURT AND INFERABLE FROM THE RULE 8006 OR RULE 8010 STATEMENT, OR WHETHER AN ISSUE MUST BE LISTED EXPLICITLY IN THE STATEMENT OF ISSUES IN ORDER TO BE REVIEWED

The federal circuits are divided on the obligations of the parties to list all their claims in the statement of issues required by Federal Rules of Bankruptcy Procedure 8006, 8009 and 8010 ("Rules 8006, 8009 and 8010"). The First, Third, Fifth and Ninth Circuits have held that any claim not included in the statement of issues is waived; the Second, Sixth and Eleventh Circuits have ruled that the appellate court may exercise broad discretion to infer issues from the record and pleadings.

The conflict between circuits has been summarized in *Intelligent Mailing Systems v. Ascom Hasler Mailing Systems, Inc.*, 2006 U.S. Dist. LEXIS 6488 (D. N.D. Ohio 2006). The *Intelligent Mailing Systems* court considered an argument by the appellee that certain issues were not preserved for appeal because they were not included in the Rule 8006 statement, and also because they were raised for the first time in appellant's opening brief. The court stated:

> No decisions within the Sixth Circuit have addressed the waiver of issues regarding Rule 8006, but the Fifth Circuit has adopted a strict rule that "even if an issue is argued in the bankruptcy court and ruled on by that court, it is not preserved for appeal under Bankruptcy Rule 8006 unless the appellant includes the issue in its statement of issues on appeal." *Zimmerman v. Jenkins (In re GGM, P.C.)*, 164 F.3d 1026, 1031-32 (5th Cir. 1999); see *Energrey Enters. v. Oak Creek Energy Sys.*, 119 B.R. 739 (D. E.D. Ca. 1990); *In re Pine Mountain, Ltd.*, 80 B.R. 171 (B.A.P. 9th Cir. 1987). . . . And the Third Circuit, when considering the failure to specify an issue in a Rule 8006 statement, addressed both compliance with Rule 8006 as well as compliance with the briefing requirements of Rule 8010. See *In re Trans World Airlines, Inc.*, 145 F.3d 124, 132 (3d Cir. 1998) (finding that in addition to failing to specify the issue in a Rule 8006 statement appellant failed to comply with Rule 8010 by making scant references to the issue within the opening brief and by failing to specify whether the bankruptcy court had discussed the issue to any extent).

Intelligent Mailing Systems, 2006 U.S. Dist LEXIS 6488 at **9-10.

The district court in *Intelligent Mailing Systems* declined to follow the rigid rule established by the Third, Fifth and Ninth Circuits. Instead, the court

opted for the more responsive standard of the Second, Sixth and Eleventh Circuits:

> The Eleventh Circuit . . . applied a more flexible rule: "An issue that is not listed pursuant to [Rule 8006] and is not inferable from the issues that are listed is deemed waived and will not be considered on appeal." *Snap-On Tools, Inc. v. Freeman (In re Freeman)*, 956 F.2d 252, 255 (11th Cir. 1992). . . . Cf. *Joelson v. Brown (In re Brown Family Farms)*, 872 F.2d 139, 141-42 (6th Cir. 1988) ("Under Bankruptcy Rules 8001 and 8010, the district court could, within its discretion, deem [an issue] waived if it believed that the issues as presented and argued in the [appellate] brief did not effectively contest the [underlying determinations of the bankruptcy court].")
>
> The Court is more inclined to adopt the flexible rule applied within the Eleventh Circuit. "Thus, as long as an issue is inferable, then Rule 8006 'is not intended to bind either party to the appeal as to the issues that are to be presented.'" *In re Bracewell*, 322 B.R. 698, 701-02 (D. M.D. Ga. 2005) (quoting *In re Cohoes Indus. Terminal, Inc.*, 90 B.R. 67 (D. S.D. N.Y. 1988) at 70). Circumstances useful in determining whether an issue not listed in a Rule 8006 statement is inferable include: whether the issue was raised in the bankruptcy court (because an appellate court generally will not consider issues not adjudicated below); whether the issue requires the court to make any independent factual

> findings; and whether the issue presents unfair surprise to the other litigant. See *id.* at 702.

Intelligent Mailing Systems, 2006 U.S. Dist. LEXIS 6488 at **10-11.

Petitioner asks this Court to adopt the general rule of the Second, Sixth and Eleventh Circuits that failure to list an issue in the Rule 8006 statement or Rule 8010 statement need not constitute a waiver for purposes of appeal. Instead, the appellate court should exercise discretion in determining whether to infer an issue from the record and pleadings and consider alternatives to the extreme sanction of dismissal.

C. THE NINTH CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION IN SUMMARILY DISMISSING DEBTOR STINE'S APPEAL

Respondent Yarnall asserts in his Brief in Opposition:

> On issues relating to compliance with procedure, the Ninth Circuit Court of Appeals has found consistently that a party in bankruptcy proceedings must meet procedural requirements or face dismissal.

Op. 2. Respondent's position oversimplifies the standard for dismissal on the basis of non-compliance with procedural requirements. In the Ninth Circuit, as elsewhere, dismissing a bankruptcy appeal on procedural grounds, rather than reaching the merits

of the appeal, must be reviewed for abuse of discretion. *See, In re Hill*, 775 F.2d 1385, 1386 (9th Cir. 1985); *In re Donovan*, 871 F.2d 807, 808 (9th Cir. 1989); *In re Fitzsimmons*, 920 F.2d 1468, 1471 (9th Cir. 1990).

A Second Circuit decision, *In re Harris*, 464 F.3d 263 (2d Cir. 2006) (Sotomayor, Circuit Judge), examined the criteria for abuse of discretion in the dismissal of a bankruptcy appeal for non-compliance with non-jurisdictional bankruptcy rules. Under the *Harris* analysis, a court abuses its discretion when it "applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed[s] on the basis of an erroneous view of the applicable law" (citation omitted). *Id.* at 268. The Second Circuit Court of Appeals found that the district court abused its discretion in dismissing debtor's appeal, where the debtor did not include with its appeal a transcript of the proceedings before the bankruptcy court as required by Rule 8006. *Id.* at 274.

In *Resolution Trust Corp. v. SPR Corp. (In re SPR Corp.)*, 45 F.3d 70 (4th Cir. 1995), a panel of the Fourth Circuit, which included Justice Powell (retired), held that under Rule 8001 an appellate court must consider, before dismissing a late-filed appeal, whether to:

> (1) make a finding of bad faith or negligence; (2) give the appellant notice or an opportunity to explain the delay; (3) consider whether the delay had any possible prejudicial effect on the other parties; or (4) indicate that it

> considered the impact of the sanction and available alternatives.

Id. at 72 (cited in *Harris*, *supra*, at 270). In SPR *Corp.*, the Court of Appeals found that the district court abused its discretion in dismissing the appellant creditor's appeal because of an untimely filing of the statement of issues required by Rule 8006. Because the district court did not consider all the above-listed factors, the Court of Appeals vacated the judgment and remanded.

The *Harris* court also looked to a decision of the Ninth Circuit Court of Appeals in reviewing dismissal for abuse of discretion:

> The Ninth Circuit has also held that in the Rule 8006 context, a district court should consider a party's bad faith and the availability of alternative sanctions except in the most egregious of circumstances before dismissing the appeal under Rule 8001. *In re Fitzsimmons*, 920 F.2d 1468, 1474 (9th Cir. 1990).

Harris, 464 F.3d at 270-71.

In *Fitzsimmons*, the Ninth Circuit concluded that the district court did not abuse its discretion in dismissing an appeal by a corporation which violated a number of bankruptcy court rules as well as the requirements of Rule 8006. The bad faith of the appellant "constitutes egregious circumstances which

can warrant dismissal even without the explicit consideration of alternative sanctions and relative fault." *Id.* at 1474. The Ninth Circuit stated that "as a general rule the district court must consider alternative sanctions to dismissal," except in egregious circumstances such as the appellant's bad faith behavior (citing cases). *Id.* at 1472.

In re Hill, 775 F.2d 1385 (9th Cir. 1985) set forth the standard for reviewing abuse of discretion:

> [W]hen any court is considering the imposition of sanctions for non-jurisdictional, procedural defaults and deficiencies in the management of litigation, the selection of the sanction to be imposed must take into consideration the impact of the sanction and the alternatives available to achieve assessment of the penalties in conformity with fault. *Absent such consideration, there is an abuse of discretion.*

Id. at 1387 (emphasis added).

The Ninth Circuit held in *Hill* that it is an abuse of discretion to dismiss a bankruptcy appeal on procedural grounds without considering the impact of the sanction and available alternatives. The Ninth Circuit held in *Fitzsimmons* that "unless there are egregious circumstances, the district court must, as the general rule requires, explicitly consider relative fault and alternative sanctions." *Fitzsimmons*, 920 F.2d at 1474. Yet debtor Stine's appeal was dismissed without any

such consideration of the sanction's impact or available alternatives. The summary dismissal was an abuse of discretion, and the judgment of the circuit court should be vacated.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL LUCID
Counsel of Record
56 Village Parkway
Santa Monica, CA 90405
(310) 849-1498
dan@bestcases.org

CHRISTOPHER P. BURKE
218 S. Maryland Parkway
Las Vegas, NV 89101
(702) 385-7987
atty@cburke.ivcoxmail.com

DAVID KRIEGER
HAINES & KRIEGER, L.L.C.
1020 Garces Avenue, Suite 100
Las Vegas, NV 89101
(702) 880-5554

MICHAEL C. LEHNERS
429 Marsh Avenue
Reno, NV 89509
(775) 786-1695

Attorneys for Petitioner

Federal Rules of Bankruptcy Procedure

Rule 8006. Record and Issues on Appeal

Within 14 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 14 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 14 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing

the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8009. Briefs and Appendix; Filing and Service

(a) Briefs.

Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 14 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve and file a brief within 14 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 14 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

(b) Appendix to brief.

If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following:

(1) The complaint and answer or other equivalent pleadings;

(2) Any pretrial order;

(3) The judgment, order, or decree from which the appeal is taken;

(4) Any other orders relevant to the appeal;

(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;

(6) Any motion and response on which the court rendered decision;

(7) The notice of appeal;

(8) The relevant entries in the bankruptcy docket; and

(9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel.

An appellee may also serve and file an appendix which contains material required to be included by the appellant but omitted by appellant.

Rule 8010. Form of Briefs; Length

(a) Form of briefs.

Unless the district court or the bankruptcy appellate panel by local rule otherwise provides, the form of brief shall be as follows:

(1) Brief of the appellant.

The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(A) A table of contents, with page references, and a table of cases alphabetically arranged, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(B) A statement of the basis of appellate jurisdiction.

(C) A statement of the issues presented and the applicable standard of appellate review.

(D) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and the disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.

(E) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the

authorities, statutes and parts of the record relied on.

(F) A short conclusion stating the precise relief sought.

(2) Brief of the appellee.

The brief of the appellee shall conform to the requirements of paragraph (1)(A)-(E) of this subdivision, except that a statement of the basis of appellate jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(b) Reproduction of statutes, rules, regulations, or similar material.

If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar material, relevant parts thereof shall be reproduced in the brief or in an addendum or they may be supplied to the court in pamphlet form.

(c) Length of briefs.

Unless the district court or the bankruptcy appellate panel by local rule or order otherwise provides, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or similar material.